HARTLEY et al. *v.* NEAVES et al.

Jan. 27, 1915.

[84 S. E. 97.]

1. Logs and Logging (§ 3*)—Timber Deeds—Construction.—A deed to standing timber, with the right for a fixed period to cut and remove it, does not convey an absolute title to all the timber, but merely to such as may be cut and removed within the period fixed.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.* 13 Va.-W. Va. Enc. Dig. 219; 14 Va.-W. Va. Enc. Dig. 1024; 15 Va.-W. Va. Enc. Dig. 1007.]

2. Logs and Logging (§ 3*)—Timber Deeds—Construction.—Where a timber deed provided that the grantees should have five years in which to cut and remove the timber, and that additional time, not to exceed five years, should be granted for removal upon payment of $15 a year for the additional time, the grantees were bound to make payment and request extension before the expiration of the first five-year period, and, not having done so, their rights under the deed were lost.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.* 13 Va. W. Va. Enc. Dig. 219; 14 Va.-W. Va. Enc. Dig. 1024; 15 Va.-W. Va. Enc. Dig. 1007.]

Appeal from Circuit Court, Dinwiddie County.

Suit for partition by Henry C. Neaves and others, in which E. A. Hartley and another were allowed to intervene as defendants. From a decree for complainants, defendants appeal. Affirmed.

Chas. E. Plummer, of Petersburg, for appellants.

R. H. Mann and *Robert G. Bass,* both of Petersburg, for appellees.

CARDWELL, J. In a suit instituted by Henry C. Neaves against the other heirs of Hadrian A. Neaves and Mary A. Neaves, his wife, both deceased, pending in the circuit court of the county of Dinwiddie, having for its object the partition, allotment, or sale of two tracts of land located in Dinwiddie county, one a tract of 266 acres and the other a tract of 113 acres, belonging to the parties to said suit. E. A. Hartley and R. B. Hartley intervened by petition, claiming to own the timber on the 113-acre tract by virtue of a deed dated July 5, 1905, executed by Mary A. Neaves and her two living children and their wives, viz., H. C. Neaves and Ellie Neaves, his wife, J. W. Neaves and Minnie

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Neaves, his wife. To this petition all of the descendants of the said Mary A. Neaves, deceased, were made parties defendant.

Mary A. Neaves acquired this tract of land under the will of her father, John M. Baugh, she to receive the profits therefrom during her natural life and at her death the land was to become the property of her children then living. The said H. C. Neaves and J. W. Neaves were the only children of Mary A. Neaves living at her death, and the circuit court, upon a hearing of the cause upon the petition filed therein by E. A. Hartley and R. B. Hartley, having for its object the construction of the aforesaid deed dated July 5, 1905, and to have the court decree against Henry C. Neaves and Ellie Neaves, his wife, and J. W. Neaves and Minnie Neaves, his wife, "requiring of them specific performance of the covenant to grant additional time in which to cut and remove said timber," held, that the grantors in the said deed were the owners of the entire tract of 113 acres of land at the time the deed was made, and therefore conveyed at that time a title to the timber standing on the land to the grantees named in the deed, but further held that said grantees were not entitled to the timber after the expiration of the first five-year period mentioned in the deed, which expired on July 5, 1910, on account of their failure to pay the extension money for the additional time desired on or before July 5, 1910.

Petitioners, E. A. and R. B. Hartley, complaining of this latter ruling, applied for and obtained this appeal, praying that the decree of the circuit court may to that extent be reviewed and reversed by this court.

The provisions of the deed in question, which belongs to that class of conveyances now commonly known and spoken of as "timber contracts," in so far as they are pertinent to this inquiry, are as follows:

"It is agreed that the parties of the second part shall have five years in which to cut and remove the said timber, and shall have free ingress and egress over and upon said land for the purpose of removing said timber. It is also agreed that additional time, not to exceed five years, will be granted to the parties of the second part for removal of said timber upon the payment of fifteen dollars a year for the said additional time."

None of the timber was cut during the first period of five years, which expired on July 5, 1910, and no indication is claimed to have been given of a desire on the part of the grantees in the deed, appellants here, to obtain further time within which to cut and remove the timber, nor any offer made to pay the money required for such extension until some time in October, 1910, or more than 90 days after the expiration of the first five-year period. In October, 1910, a conversation was had by one of

the appellants, R. B. Hartley, with J. W. Neaves, one of the appellees, with reference to an extension of the time within which to cut and remove the timber, but the latter declined to receive the extension money or to grant any additional time, saying that the entire estate was in the hands of counsel for settlement, and it would be discourteous to receive the money. Whether or not he would have received the money if the settlement of the estate had not been in the hands of counsel is immaterial.

The errors assigned in the petition for this appeal are: (1) That the circuit court erred in construing this timber contract to be a contract to grant additional time within which to remove the timber from the land, on condition that payment for such additional time was made or tendered on or before the 5th day of July, 1910; (2) that it was error to declare a forfeiture of the timber for failure to pay or tender, on or before July 5, 1910, the extension money provided for in said contract, even though the payment or tender on or before the time mentioned be regarded as a condition precedent.

[1, 2] In our view of the case it will be unnecessary to consider the second of these assignments of error, for the reason that the law, whatever it may be, with regard to the policy of courts of equity to relieve against the consequences of a failure to perform conditions stipulated in a contract, whether precedent or subsequent, has no application to this case. The decree complained of does not declare a forfeiture of the timber in question to grantors in the timber contract, but simply adjudged and decreed that the grantees had no title to or interest in the timber after the expiration of the period of five years within which to cut and remove the same, they having failed to comply with the terms and conditions upon which they alone would have had a right to further time within which to cut and remove the timber.

In Young *v.* Camp Mfg. Co., 110 Va. 678, 66 S. E. 843, and Wright *v.* Camp Mfg. Co., 110 Va. 678, 66 S. E. 843, the construction of instruments such as is in question here was carefully examined, and the conclusion reached that a deed to standing timber, with the right for a fixed period to cut and remove the same, does not convey an absolute and unconditional title to the timber, but only conveys title to such as may be cut and removed within the fixed period.

The conclusion reached in the cases just cited as to the character and effect of such contracts was approved and followed in the later cases of Brown *v.* Surry L. Co., 113 Va. 503, 75 S. E. 84, Quigley F. Co. *v.* Rhea, 114 Va. 271, 76 S. E. 330, and in the more recent case of Smith *v.* Ramsey, 116 Va. —, 82 S. E. 189, where the preceding cases were reviewed, the opinion by Buchanan, J., saying:

"While the facts in those cases and in this as to what had been done under the contracts or deeds were different, the character of the contract in each was substantially the same. Those decisions would seem, therefore, to settle, if decisions can settle a question, that the provisions in such contracts for the cutting and removal of the timber within a fixed period are not covenants, but conditions."

In Wright *v.* Camp Mfg. Co., supra, it is said:

"By the great weight of authority it is determined that no right of title exists in the grantee after the expiration of the time specified in the deed or contract."

The controversy here depends upon the meaning of the words in the contract:

"It is also agreed that additional time not to exceed five years will be granted to the parties of the second part for removal of said timber upon the payment of fifteen dollars a year for the said additional time."

It is the contention of appellants that under a proper construction of the contract, the estate in the timber, so long as it remains on the land, is limited to ten years—not to 5—there being no condition or limitation contained in the contract to defeat the estate other than the limitation of the time for cutting, which is fixed at 10 years. As supporting this contention, the cases of Ciapusci *v.* Clark, 12 Cal. App. 44, 106 Pac. 436, and Perkins *v.* Stockwell, 131 Mass. 529, are cited.

In the first-named case the contract recited the sale of all timber growing on certain land for a stated price, and gave the purchasers "four years to take said timber off of said land, with the privilege of a longer time by paying the sum of $5 rent in advance for a time not exceeding ten years from date of this agreement," and the court, taking the view that the word "rent" was to be given some significance, and as rent usually was payable on the last day of the term, held that the stipulated sum for the extension of the time limit could be paid as rent, saying:

"Regarding the $5.00 payment as rent, there could be no forfeiture under this agreement without demand by the plaintiff of the rental sum upon or after the last day given the lessee on which to pay."

The court in that case, as do all the decisions of that court construing timber contracts, holds that there may be an absolute title in timber granted, and the specified time to remove is merely a covenant. There is therefore such a conflict with the doctrine declared by the decisions of this and other courts with respect to such contracts that the rule of construction followed by the California court in the case of Ciapusci *v.* Clark, and others can have no controlling influence in the construction of the contract here under consideration.

In Perkins *v.* Stockwell, supra, the stipulation as to time of removal was, "Except reserving all the pine trees or pine timber thereon standing and to stand and grow thereon for the term of ten years from October 30th, A. D. 1867, and longer by paying said Stockwell ten dollars per year after the expiration of the ten years aforesaid;" and the court held that the right of the grantor to the pine timber was lost by his failure to elect to have them stand and grow, longer, by any offer of payment of the $10 to Stockwell for more than a year after the expiration of the 10-year period. It is to be observed that by the express terms of the contract the payment of the $10 per year was to be made "after the expiration of the ten years," and the opinion of the court said:

"It was for them [grantors in the deed] to determine at the end of the 10 years whether they desired to secure the further right to which they were entitled. They could only do this in the mode prescribed by the reservation. Whether they should make this payment at the moment or close of the year need not be considered, as no suggestion of payment was made until more than a year after the expiration of the ten years."

The language of the contract construed in that case was quite different in its import and meaning from that appearing in the contract in the instant case with respect to additional time for the removal of the timber.

In a number of cases decided by the Supreme Court of North Carolina, the same view is taken of these timber deeds or contracts that this court has uniformly taken, viz., that by correct interpretation they convey to the grantees an absolute estate in the timber, determinable as to all of the timber not cut and removed within the stipulated period. Among the cases decided by the North Carolina court adverted to is Bateman *v.* Kramer Lumber Co., 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615, where a deed conveying standing timber on a certain tract of land stipulated that the grantees should have two years in which to cut and remove the timber, "and in the event they do not cut it off in that time, they shall have one year's time thereafter in which to remove the same by paying to the party of the first part interest on the purchase money for said extension time." Held, that, if the parties of the second part desired an extension of one year, it was a condition precedent to the obtaining of the extension to claim the privilege before the expiration of the two-year period, and notify the party of the first part, the owner of the property, and tender the stipulated amount required for the extension. See, also, Powers *v.* Angola L. Co., 154 N. C. 405, 70 S. E. 629.

In the still later case decided by the same court in 1912 of

Rountree *v.* Cohn-Bock Co., 158 N. C. 153, 73 S. E. 796, construing a deed or timber contract quite similar to the one here under consideration, in its provisions as to time within which the timber might be cut and removed and as to how the grantee or purchaser of the timber might acquire such additional time as might be required, not exceeding three years, to remove the timber, the opinion of the court says:

"It is well settled that the legal effect of the first clause in the deed to the Gay Lumber Company, conveying the timber with the right to remove the same in five years, is to convey all the timber which the vendee should remove within the prescribed time, and that such as remained thereon after that time would belong to the vendor, or to his grantee of the premises. Hornthal *v.* Howcott, 154 N. C. 228, 70 S. E. 171; Powers *v.* Lumber Co., 154 N. C. 407, 70 S. E. 629.

"It was also decided at the last term, in Bateman *v.* Kramer Lumber Co., 154 N. C. 248 [70 S. E. 474, 34 L. R. A. (N. S.) 615], * * * that the correct interpretation of a clause, extending the time within which the timber may be removed, requires of the grantee, claiming the privilege, that he notify the owner of the property of his intention to exercise it, and that he pay or tender the stipulated amount on or before the expiration of the first period, granted for the * * * removal of the timber. It follows, therefore, from these authorities and upon the admissions that no notice was given to the grantors in the deed to the Gay Lumber Company of an intention to exercise the privilege of extending the time for the removal of the timber, and that no money was paid or tendered on or before the expiration of the first period; that the defendant has no title to nor interest in the timber, unless there is something in the deed which requires the application of a different doctrine.

"The defendant contends there is a clause in the deed, not to be found in any of the timber deeds construed by this court, * * * and relies upon that part providing that, 'The said parties of the second part, their heirs and assigns, shall have power, and are hereby authorized at any time during the period last aforesaid to enter upon the lands,' etc. In our opinion, that clause does not have the effect of waiving any of the conditions necessary to make the extension clause effective, but does define what may be done under it after the conditions have been performed. The 'period last aforesaid' has never had any existence because of failure to give notice and to pay or tender the stipulated amount, and the defendant cannot justify an entry on the lands thereunder.

"We, therefore, conclude that there is no error in the judg-

ment restraining the defendant from entering on said lands and cutting the timber therefrom."

An analogous case is Boring L. Co. *v.* Roots, 49 Or. 569, 90 Pac. 490, where it is held that a party must prove the allegations or claims on which he relies, and if rights are conditional, he must prove a compliance with the conditions. In the opinion of the court in that case it is said:

"Plaintiff, however, contends that on December 30, 1902, it was granted by defendant an extension of time, amounting to one year, in which to take off the timber, and the record does contain a writing signed by the defendant to that effect but it is conditional, not absolute. The condition is 'in case O. A. Palmer keeps operating the mill at Boring Junction under his contract with F. S. Morris.' This is a condition precedent, and there is no evidence in the record that the condition was complied with so as to make the extension effective.

The rule of construction of timber deeds or contracts followed in the cases cited imposes no unreasonable burden or hardship upon the grantee or vendee in such deeds or contracts. Those cases are directly in point here, and the ruling therein rests upon sound and logical reasoning. Not only so, but in the very terms of the contract we have under consideration, as would seem clear, appellants could only secure the privilege of removing the timber after the five-pear period, fixed in the contract as the time limit for the removal of the same, expired, by notice given to appellees of their intention to exercise that privilege and paying or tendering the stipulated amount required to be paid for the extension on or before the expiration of the first-named period granted in the contract. It is admitted that no notice was given by appellants to appellees of an intention to exercise the privilege of extending the time for the removal of the timber, nor was the stipulated amount of money required to be paid for the extension paid or tendered to appellees on or before the expiration of the first period of five years, so that an extension of that period has never had any existence. If appellants could wait over 90 days before giving such notice and paying or tendering the money to be paid by them for an extension of time for the removal of the timber, they could have as well waited till the end of the year following the expiration of the five-year limit of the time and thus left appellees in suspense as to their right to dispose of their timber, and as to the use they could make of their land upon which the timber is standing. No duty was imposed upon appellees in their contract with appellants with respect to an extension of the time for the removal of this timber other than to grant an extension not to exceed five years upon proper demand being made of them for the extension and the payment or tender of the stipulated amount therefor.

We are of opinion that the decree appealed from, ruling that be appellants, upon the facts in the case, had no title to or interest in the timber in question after the expiration on July 5, 1910, of the five-year period named in the contract between the parties, is plainly right, and therefore is affirmed.

Affirmed.

Note.

Very few legal questions have given rise to more diversity of opinion than the construction of conveyances of title to growng timber without conveying title to the land. In such convevance it is usually stipulated that the timber is to be cut and removed within a certain time. It is an interesting question whether such stipulation shall be construed as covenants or as conditions, and upon the determination of this question depends the rights of the parties to timber not cut and removed within such time. If it is held to be a mere covenant for removal within the time stipulated, the title to the timber remains in the grantee, even though he does not remove it within such time, but if it is held to be a condition the grantee loses all right to the timber not removed within such time. Green *v.* Bennet, 23 Mich. 464; Smith *v.* Ramsey, 116 Va. —, 82 S. E. 189. In Virginia it is well settled and uniformly held that such stipulations are conditions and not covenants, and that a deed to standing timber with the right for a fixed period to cut and remove the same does not convey an absolute and unconditional title to the timber, but only conveys title to such as may be cut and removed within the fixed period. Young *v.* Camp Mfg. Co., 110 Va. 678, 66 S. E. 843; Brown *v.* Surry Lumber Co., 113 Va. 503, 75 S. E. 84; Quigley Furniture Co. *v.* Rhea, 114 Va. 271, 76 S. E. 330; Smith *v.* Ramsey, 116 Va. —, 82 S. E. 189. And this construction is favored in United States by the weight of authority, as applying both to conveyances of growing timber and to reservations to the grantor of timber growing on land conveyed. Howard *v.* Lincoln, 13 Me. 122; Macomber *v.* Detroit, etc., R. Co., 108 Mich. 491, 66 N. W. 376, 32 L. R. A. 102, 62 Am. St. Rep. 713; Reed *v.* Merrifield (Mass.), 10 Metc. 155; Rich *v.* Zeilsdorff, 22 Wis. 544, 99 Am. Dec. 81; Pease *v.* Gibson (Me.), 6 Greenl. 81; Putney *v.* Day, 6 N. H. 430, 25 Am. Dec. 470; Webber *v.* Procter, 89 Me. 404, 36 Atl. 631; Boisaubin *v.* Reed, 1 Abb. App. Dec. 161, 41 N. Y. (2 Keyes) 323; Baxter *v.* Mattox, 106 Ga. 344, 32 S. E. 94; Strong *v.* Eddy, 40 Vt. 547; Golden *v.* Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32; Adkins *v.* Huff, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A., N. S., 649; Null *v.* Elliott, 52 W. Va. 229, 43 S. E. 173; Richards *v.* Tozer, 27 Mich. 451; McRae *v.* Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; Saltsonstall *v.* Little, 90 Pa. 422, 35 Am. Rep. 683. However, there are several cases holding contra. Halstead *v.* Jessup, 150 Ind. 85, 49 N. E. 821; Irons *v.* Webb, 41 N. J. L. 203, 32 Am. Rep. 193; Stukeley *v.* Butler, Hobart, 168 F. Moore, 880; Magnetic Ore Co. *v.* Marbury Lumber Co., 104 Ala. 465, 16 So. 632, 27 L. R. A. 434, 53 Am. St. Rep. 73; Monroe *v.* Bowen, 26 Mich. 523; Wait *v.* Baldwin, 60 Mich. 622, 27 N. W. 697, 1 Am. St. Rep. 551. Halstead *v.* Jessup, supra, holds that the grantee does not lose title to the timber by failure to remove it within the stipulated time, but still has a right to enter and remove it, although he is liable for any damage resulting from his failure to remove within the proper time. The court in that case said: "The law does not favor forfeitures, and will not enforce them, in the absence of clearly-stated

conditions of forfeiture. Here, as we have said, there is no stated condition of forfeiture. If, by delay in taking the timber, after the period named, damage should accrue to the owner of the land, it could not be questioned that such damage could be recovered. But it would be manifestly unjust that mere delay should forfeit both the appellant's money and his timber, and that the appellee should become the owner of the timber upon the strength of an implied forfeiture." Halstead *v.* Jessup, 150 Ind. 85, 49 N. E. 821, 822.

In regard to the necessity for removing as well as cutting, the majority of the cases hold that a stipulation in a deed to standing timber giving the purchaser a certain specified time in which to cut and remove it fixes the period within which to remove it as well as to cut it, and where the purchaser has cut and manufactured the timber within the time specified, but has not removed it, it reverts to the vendor. Smith *v.* Ramsey, 116 Va. —, 82 S. E. 189. See, also, Strong *v.* Eddy, 40 Vt. 547, 551; Boisaubin *v.* Reed, 41 N. Y. (2 Keyes) 323, 1 Abb. Dec. 161; Inderlied *v.* Whaley, 65 Hun 407, 20 N. Y. Supp. 183; Gamble *v.* Gates, 92 Mich. 510, 52 N. W. 941; Irons *v.* Webb, 41 N. J. L. 203, 32 Am. Rep. 193. "Contracts relating to an interest in standing timber, with an express limitation as to the time of removal, are familiar to the American courts in the timbered states. The cases arising upon them are extensively collated in the exhaustive briefs of counsel, but are too numerous to be here considered in detail. Sometimes these contracts are in the form of conveyances of timber, sometimes of a sale, coupled with a license to enter, sometimes of a formal license to enter and cut, and again of a reservation of the timber by the grantor in the conveyance of the land. But, whatever the form, the limitation as to the time of removal has been almost invariably held to be a limitation of the grant or reservation itself. The reasons are manifest. Any other construction would be against the expressed intention of the parties. Moreover, if the right of entry be not limited to the time fixed, it would be practically unlimited, which would amount to so serious an incumbrance upon the land as to materially interfere with the owner's right to use or dispose of it. In a very few cases it has been held that, if the timber be cut within the time, the property is in the vendee, although not removed, within the limitation of the contract. This doctrine would seem to be based upon the supposed hardships of such a case, rather than upon strict logic." King *v.* Merriman, 38 Minn. 47, 35 N. W. 570.

One of the exceptions is the case of Johnson *v.* Truitt, 122 Ga. 327, 50 S. E. 135, where it is held that a purchaser who has cut timber but failed to remove it within the specified time does not lose his title thereto, and that the landowner has no right to convert such timber to his own use. And see Halstead *v.* Jessup, 150 Ind. 85, 49 N. E. 821. Plumer *v.* Prescott, 43 N. H. 277, holds that where all the wood and timber on certain land is sold, with the right to remove the same until a specified date, at which time the timber has all been cut, part of it being left on the land, the owner of the land can not, in an action of trespass against the purchaser of the timber for entering subsequent to such date and removing the timber, recover its value, as, if the sale was limited to the trees that were cut by the specified date, the purchaser acquired the title in the timber cut, which was not forfeited by the failure to remove it within the specified time. Cited in note in 55 L. R. A. 530.

Title to timber cut after the expiration of the stipulated time remains in the grantors, and they can reclaim the logs without render-

ing themselves liable to the grantees or their assignees for any expenditure made in cutting and skidding them. Quigley Furniture Co. *v.* Rhea, 114 Va. 271, 76 S. E. 330.

A deed conveying standing timber giving the purchaser five years in which to cut and remove the same from the time they should commence cutting it, does not give the purchaser a perpetual right to enter and cut the timber but merely gives him a reasonable time to do so. Brown *v.* Surry Lumber Co., 113 Va. 503, 75 S. E. 84. A conveyance of standing timber giving the right for a specified time to cut and remove the same without a further right, in event of failure to remove in such time, to such additional time as the grantee might desire upon paying interest on the selling price annually, only conveys title to such timber as may be cut and removed within the specified time and within such reasonable extensions thereto as the grantee shall be entitled to, or as may be agreed upon by the parties and does not convey the right to cut and remove the timber for indefinite time. Young *v.* Camp Mfg. Co., 110 Va. 678, 66 S. E. 843. And where H., by written contract, sold T. & Bro. certain timber, and allowed them four years to cut it down, and afterwards endorsed on the contract these words: "I agree to extend the time for cutting timber as fixed in this contract each year B. rents and operates the G. steam mills, said extension to cover a period of five years from the expiration of this within contract, this extension of time being based on said B. renting and operating said G. steam mills;" and before the expiration of the four years, said mills burned down and were never rebuilt, and had never since been rented and operated by T. & Bro., it was held, that the extension was to begin after the expiration of the four years, and the condition upon which the extension was to begin, never was fulfilled. Hughes *v.* Tinsley & Bro., 80 Va. 259. In the absence of stipulations as to the time in which the timber must be cut and removed it is generally held that this must be done within a reasonable time. Howe *v.* Batchelder, 49 N. H. 204; Goette *v.* Lane, 111 Ga. 400, 36 S. E. 758; Hill *v.* Hill, 113 Mass. 103, 18 Am. Rep. 455; Wood *v.* Elliott, 51 Mich. 320, 16 N. W. 666; Hoit *v.* Stratton Mills, 54 N. H. 109, 30 Am. Rep. 119; Andrews *v.* Wade (Pa.), 3 Sad. 133, 6 Atl. 48.

PILCHER *v.* PILCHER.

March 11, 1915.

[84 S. E. 667.]

1. Wills (§ 133*)—Validity—"Signature."—Under Code 1904, § 2514, declaring that no will shall be valid unless it be in writing and signed by the testator or by some other person in his presence in such a manner as to make it manifest that the name is intended as a signature, and, unless it be wholly written by the testator, the signature shall be acknowledged in the presence of at least two competent witnesses who shall subscribe the will in the presence of the testator, a holograph will, intended as such, which was signed only with

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.